Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Pacific Bell Telephone Company	)	
Pacific Bell Tariff FCC No. 128	)	CC Docket No. 98-103
Pacific Bell Transmittal No. 1986	)	
	)	

OPPOSITION TO DIRECT CASE BY THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

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SUMMARY

The Orders Designating Issues ("ODIs") giving rise to these three tariff investigations are perfectly clear that the threshold issue "is whether [a] DSL service offering is an interstate service, properly tariffed at the federal level or an intrastate service that should be tariffed at the state level."[1] But PacBell, BellSouth, and GTE insist on injecting an additional threshold issue that is unmentioned in the ODIs: the claim that DSL calls to ISPs are access traffic[2]

The reason the ILECs are frantically seeking a ruling that calls to ISPs constitute access traffic in these narrow DSL investigation proceedings has nothing to do with the jurisdictional issue designated in the ODIs. The ILECs are seeking this ruling because of their entirely separate dispute with CLECs concerning reciprocal compensation for dial-up calls to ISPs. Most of the reciprocal compensation agreements involved

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[1] ODI in CC Docket No. 98-103, released September 2, 1998 ("PacBell ODI") at ¶ 10. See also ODI in CC Docket No. 98-161, released September 1, 1998 ("BellSouth ODI") at ¶ 10, and ODI in CC Docket No. 98-79, released August 20, 1998 ("GTE ODI") at ¶ 12. Because the same legal issues are raised by each of the three direct cases, ALTS is filing the identical pleading in each docket for the convenience of the Commission and the parties.

[2] See, e.g., BellSouth Direct Case at i: "The Commission suspended BellSouth's ADSL offering for a day and instituted an investigation to address a single issue: whether BellSouth's ADSL service offering constitutes an interstate access service, and thus is subject to the Commission's jurisdiction" (emphasis supplied). See also PacBell Direct Case at ii: "Pacific's ADSL service is classified as an exchange access service under Commission rule as supported by the Advanced Services Order" (emphasis supplied); and GTE Direct Case at 19.

in that dispute exclude "access" traffic in accordance with the Commission's rules (§ 51.701), as well as the rules of many states. Thus, the ILECs want to lure the Commission into labeling DSL calls to ISPs as "access" so they can try to relitigate the twenty-one state decisions that have determined that ILECs must pay reciprocal compensation for dial-up calls to ISPs.

The ILECs' claim that ADSL is an "access" service is devoid of legal merit. First, as BellSouth itself admits: "ADSL service does not fall within the Communications Act's definition of exchange access" (Direct Case at 17). Second, ADSL also falls outside the definition of "access" set forth in § 69.2 of the Commission's rules.

Beyond this clear legal result, there are additional institutional considerations why the Commission should take care to steer clear of the ILECs' carefully-baited trap. Even if the Commission believes there are policy benefits in finding that this traffic is interstate, that particular jurisdictional outcome is not dependent on whether this traffic is categorized as access.[3] Furthermore, while there is a compelling equitable

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[3] PacBell claims the Deployment of Wireline Services Offering Advanced Telecommunications Capability Order and NPRM ("Advanced Wireline Services NPRM") released August 7, 1998, found that its ADSL service "is classified as an exchange access service" (Direct Case at p. ii), but that Order actually reserved this issue (at ¶ 40). Furthermore, PacBell's claim that all LEC interstate traffic constitutes access traffic (Direct Case at 15) is a flat misstatement because LEC interstate local exchange services do (continued...)

argument why labeling calls to ISPs as "access" should not exclude them from reciprocal compensation agreements,[4] it would be profoundly unfair to force CLECs to fight further prolonged battles in numerous states over whether the use of the term "access" in connection with dedicated DSL calls to ISPs would constitute the same kind of "access" that is excluded from most current reciprocal compensation agreements.

ALTS continues to maintain its position that what the ILECs portray as "DSL calls" to ISPs are actually intrastate traffic. In particular, the so-called "DSL" services at issue here are actually broadband DSL loop services that are currently bundled along with ATM transport in the tariffs under investigation. Because the DSL loop must be unbundled from the transport (as GTE concedes in its direct case), the unbundled DSL loop should be tariffed in the intrastate jurisdiction just like any other

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[3](...continued)
exist, though in much smaller volumes than interstate access (see Preliminary Statistics of Communications Common Carriers, 1997 Ed., at p. 154 (listing LEC "Interstate Basic Local Service" revenues in column 5 of row 1010).

[4] The Local Competition Order distinguished between access and reciprocal compensation by explaining "in the access charge regime, the long-distance caller pays long-distance charges to the IXC, and the IXC must pay both LECs for originating and terminating access service. By contrast, reciprocal compensation for transport and termination of calls is intended for a situation in which two carriers collaborate to complete a call"(¶ 1034). Because ISPs are end users, not carriers, calls to ISPs obviously fall in the latter category, where reciprocal compensation does apply, even if the "access" label were applied to those calls.

loop.[5]

However, ALTS' paramount goal in this proceeding is to insure that the Commission's disposition of the ODIs does not trigger an unfair and pointless hammer blow to competition by generating yet more oppressive litigation over the entirely distinct issue of reciprocal compensation for dial-up calls to ISPs. Accordingly, if the Commission does reject ALTS' showing that this calls are intrastate, and concludes instead that these DSL tariffs do carry interstate traffic, ALTS urgently requests that the Commission also find that: (1) DSL traffic to ISPs does not constitute access service; and (2) the Commission's assertion of jurisdiction over dedicated DSL service to ISPs has no effect on the long-standing state supervision of dial-up calls to ISPs and carrier-to-carrier compensation for such traffic.

[5] In this regard, DSL loops are identical to ISDN and analog loops, which are each tariffed at the state level.

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The Association for Local Telecommunications Services ("ALTS") hereby files this opposition to the direct cases filed by PacBell, BellSouth and GTE in CC Docket No. 98-103, released September 2, 1998 ("PacBell ODI"), CC Docket No. 98-161, released September 1, 1998 ("BellSouth ODI"), and CC Docket No. 98-79, released August 20, 1998 ("GTE ODI") respectively. Because the same legal issues are raised in each of the three direct cases, ALTS is filing the identical pleading in each docket for the convenience of the Commission and the parties.

I. NONE OF THE PROPOSED ADSL SERVICES IS AN "ACCESS" SERVICE.

Even if the Commission were to conclude this is interstate traffic, it should not rule that it is interstate exchange access traffic. While the ILECs claim they are not attempting in these dedicated DSL investigation proceedings to litigate the separate issue of reciprocal compensation for dial-up calls to ISPs (GTE Direct case at 7), their direct cases practically beg the

Commission to find that this traffic is access.[6] They are trying to smuggle an "access" finding into the ODIs because, as a consequence of Commission and state rules (see Rule 51.701), most reciprocal compensation agreements exclude access traffic.[7] Thus, a finding here by the Commission that calls to ISPs are "access" would be trumpeted by the ILECs as a "new" regulatory determination, and urged by them as a basis for attempting to reopen the twenty-one state decisions that have agreed with the CLECs that calls to ISPs fall within current reciprocal compensation agreements. The Commission should firmly reject this secret agenda by finding that these DSL calls to ISPs are not "access" traffic for all the reasons set forth below.

According to the simplistic view urged by the incumbents (see, e.g., PacBell Direct Case at 14-15), all LEC interstate traffic is exchange access, and thus exempted from interconnection and reciprocal compensation by the Local Competition Order (¶ 1034; Rule 51.701). Based on this "reasoning", they insist that calls to ISPs cannot be included in

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[6] See, e.g., BellSouth Direct Case at i: "The Commission suspended BellSouth's ADSL offering for a day and instituted an investigation to address a single issue: whether BellSouth's ADSL service offering constitutes an interstate access service, and thus is subject to the Commission's jurisdiction" (emphasis supplied). See also PacBell Direct Case at ii: "Pacific's ADSL service is classified as an exchange access service under Commission rule as supported by the Advanced Services Order" (emphasis supplied); and GTE Direct Case at 19.

[7] Rule 51.701 limits reciprocal compensation to "telecommunications traffic" that "originates and terminates within a local service area".

reciprocal compensation agreements, and that the costs of terminating carriers must be recovered by tariff instead.[8]

But the ILECs' assumption that all LEC interstate traffic is automatically access is simply dead wrong. While the largest portion of LEC interstate traffic does fall in the access category, there are instances of LEC interstate non-access traffic, such as traffic within exchanges that cross state lines.[9] Indeed, the Commission itself recently acknowledged the fact that DSL traffic is not automatically access traffic in its Wireline Advanced Services NPRM (at ¶ 60, declining to decide whether DSL service is exchange or exchange access service).[10]

It is plain under both the statute and the Commission's rules that this traffic is not access. Sec. 147(16) defines exchange access as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services" (emphasis supplied). No "telephone toll" service is involved in calls to ISPs. Similarly, Rule 69(2) defines "access service" as "services and

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[8] See, e.g., letter from Edward D. Young, III, and Thomas Tauke to Chairman Kennard dated July 1, 1998.

[9] See Preliminary Statistics of Communications Common Carriers, 1997 Ed., at p. 154 (listing LEC "Interstate Basic Local Service" revenues in column 5 of row 1010). Similarly, there are also interstate dedicated services (i.e., private lines) which cross state lines but which do not carry toll traffic. These facilities are clearly interstate, but not access.

[10] Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, NPRM released August 7, 1998.

facilities provided for the origination or termination of any interstate or foreign telecommunication." Even if there were an interstate information service associated with some of the ILECs' DSL calls, there plainly is no "interstate telecommunication."

Thus, the incumbents' DSL tariffs are clearly not "access" service as defined by the Act and the Commission's rules.

II. THE ILECS' DSL TARIFF PROPOSAL VIOLATES THE COMMISSION'S WELL ESTABLISHED RULE THAT SUCH RATES SHOULD BE DETERMINED BY THE STATES.

A. These DSL Tariffs Carries Only Intrastate Telecommunications Traffic.

The ILECs' DSL tariffs are intrastate traffic for two basic reasons. First, a telecommunications call to an ISP (whether DSL or otherwise) terminates at the ISP because ISPs are end users, and any associated information services provided by the ISP are simply irrelevant in determining jurisdictional end points.[11] See, e.g., In the Matter of Federal-State Joint Board on Universal Service, Report to Congress (CC Docket No. 96-45, released April 10, 1998): "Under our framework, Internet service providers are not treated as carriers for purposes of interstate access charges .." (at ¶ 106).[12]

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[11] If an ISP were located across a state line from its end user, an interstate tariff would be appropriate under those particular circumstances.

[12] See also: "Some parties argue that we should reclassify Internet service providers as telecommunications carriers in order to address congestion of local exchange networks caused by Internet usage. We note that the Commission addressed this argument last year in the Access Reform proceeding, and decided to continue to treat Internet service providers as end users for purposes of

(continued...)

Second, the "DSL tariffs" filed by the ILECs are actually a bundled offering of DSL high speed loops, along with ATM transport service to ISP interconnection points. Indeed, even GTE acknowledges that this is a bundled service that must be unbundled upon request (GTE Reply dated May 28, 1998, at 20-21: "GTE will not prevent an ISP customer from providing its own connection to the ADSL connection point." This concession is fatal to GTE's jurisdictional claim, of course, because the remaining GTE DSL service is simply a loop, pure and simple. It may be faster than ISDN or analog loops, but it is still a loop, and must be tariffed in the state jurisdiction under bedrock jurisdictional principles.

None of the ILECs offers any coherent response to these simple facts. GTE, for example, can do no better than cite vague references in various Commission pleadings to the ISPs' use of local networks to provide "interstate services," or for the purpose of "completing interstate calls" (Direct Case at 20). But this is not a jurisdictional argument, only a hodgepodge of inexact phrases culled from hundreds of Commission pages issued over two decades.[13] As the Commission well understands,

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[12](...continued)
access charges." (id. at ¶ 100); and " ... we do not treat an information service provider as providing a telecommunications service to its subscribers. The service it provides to its subscribers is not subject to Title II, and is categorized as an information service. The information service provider, indeed, is itself a user of telecommunications .. " (id. at ¶ 69 n.138).

[13] Indeed, GTE's current position is a complete reversal from (continued...)

jurisdiction based on end points has always turned on the end points of the "telecommunications service," not some inchoate "call" or "service."

B. Abrupt Elimination of State Ratemaking Authority Over Local Rates to ISPs Is a Bad Idea.

While the ILECs make little mention of the fact in their direct cases, the states' authority over the rates for local data access services has long been acknowledged. See, e.g., Digital Tornado: The Internet and Telecommunications Policy, K. Werbach, OPP Working Papers, March 1997, at 48: "The phone call to reach an ISP is usually considered a local call ...." It would be institutionally counter-productive for the Commission now to eliminate current state ratemaking authority over these calls by permitting the ILECs' DSL tariffs to continue in effect.

There is no avoiding the fact that permitting these DSL tariffs to continue would create confusion concerning state authority over this traffic. Parties would become entangled in trying to create factual distinctions between local rates to ISPs that have been reviewed by the states and the present proposals, and the Commission would have to formulate some principled way to stop any incumbent that wanted to escape state regulation by

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[13](...continued)
its December 10, 1996, comments in CC Docket No. 80-286, Jurisdictional Separations Reform, where GTE proposed that under separations reform: "both the costs and cost recovery for all facilities on the local network side of the interexchange carrier ('IXC') point of presence would be subject to state oversight" (GTE Comments at ii; emphasis supplied).

filing its own interstate rates for local calls to ISPs.[14]

The Commission should not precipitate a pointless and unnecessary conflict with the states concerning jurisdiction over these calls. If there is any need for a change in the jurisdictional treatment of this traffic -- and ALTS is not suggesting that there is any such need -- it should only be done after consultation between the Commission and the states, with a full opportunity for all parties to comment. The limited time permitted for a tariff protest, and the attendant lack of opportunity for state involvement, is exactly the wrong way to take such an important step.

Furthermore, as discussed above, it is plain that the ILECs' claim that this traffic is interstate is motivated by their desire to escape the unanimous decisions of twenty-one state jurisdictions that incumbents must pay reciprocal compensation when they exchange dial-up traffic with CLECs:

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[14] At its recent Summer meeting in Seattle, NARUC adopted a resolution in which it concluded that:

> "Resolved ... that reciprocal compensation arrangements, including those for calls to ISPs, are subject to state authority without the need for the FCC to intervene or otherwise act on this matter; and be it further
>
> "Resolved, that if the FCC intervenes regarding the broader jurisdictional issue of Internet access over the PSN, it should work cooperatively and expeditiously with the states, to consider under what circumstances and through what mechanisms this traffic may be treated as interstate, intrastate, or jurisdictionally mixed ...."

- Arizona Corporation Commission, Petition of MFS Communications Company, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions with U S West Communications, Inc., Pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996, Opinion and Order, Decision No. 59872, Ariz. CC Docket Nos. U-2752-96-362 and E-1051-96-362 (Oct. 29, 1996)

- Colorado Public Utilities Commission, Petition of MFS Communications Company, Inc., for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions with U S West Communications, Inc., Decision Regarding Petition for Arbitration, Decision No. C96-1185, Co. PUC Docket No. 96A-287T (Nov. 5. 1996)

- Connecticut Department of Public Utility Control, Petition of the Southern New England Telephone Company for a Declaratory Ruling Concerning Internet Service Provider Traffic, Final Decision, Conn. DPUC Docket No. 97-05-22 (Sept. 17, 1997)

- Florida Public Service Commission, Complaint of World Technologies, Inc., Against BellSouth Corporation; No. 971478-TP (September 15, 1998)

- Illinois Commerce Commission, Teleport Communications Group, Inc. v. Illinois Bell Telephone Company, Ameritech Illinois: Complaint as to Dispute over a Contract Definition, Opinion and Order, Ill. CC Docket No. 97-0404 (Mar. 11, 1998)

- Maryland Public Service Commission, Letter from Daniel P. Gahagan, Executive Secretary, to David K. Hall, Esq., Bell Atlantic - Maryland, Inc., Md. PSC Letter (Sept. 11, 1997)

- Michigan Public Service Commission, Application for Approval of an Interconnection Agreement Between Brooks Fiber Communications of Michigan, Inc. and Ameritech Information Industry Services on Behalf of Ameritech Michigan, Opinion and Order, Mich. PSC Case Nos. U-11178, U-111502, U-111522, U-111553 and U-111554 (Jan. 28, 1998)

- Minnesota Department of Public Service, Consolidated Petitions of AT&T Communications of the MidWest, Inc., MCIMetro Access Transmission Services, Inc. and MFS Communications Company for Arbitration with U S West Communications, Inc. Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996, Order Resolving Arbitration Issues, Minn. DPS Docket Nos. P-442, 421/M-96-855, P-5321, 421/M-96-909, P-3167, 421/M-96-729 (Dec. 2, 1996)

- Missouri Public Service Commission, Petition of Birch Telecom of Missouri, Inc. for Arbitration of the Rates, Terms, Conditions and Related Arrangements for Interconnection with SWBT, Case No. TC-98-278 (April 23, 1998).

- New York Public Service Commission, Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic, Order Closing Proceeding, NY PSC Case No. 97-C-1275 (Mar. 19 1998)

- North Carolina Utilities Commission, Interconnection Agreement between BellSouth Telecommunications, Inc. and US LEC of North Carolina, Inc., Order Concerning Reciprocal Compensation for ISP traffic, NC UC Docket No. P -55, SUB 1027 (Feb, 26, 1998)

- Public Utilities Commission of Ohio, In the Matter of the Complaint of ICG Telecom Group, Inc., Opinion and Order, Case No. 97-1557-TP-CSS (August 27, 1998)

- Oklahoma Corporation Commission, Application of Brooks Fiber Communications of Oklahoma, Inc., and Brooks Fiber Communications of Tulsa, Inc. for an Order Concerning Traffic Terminating to Internet Service Providers and Enforcing Compensation Provisions of the Interconnection Agreement with Southwestern Bell Telephone Company, Okla. CC Cause No. PUD 970000548 (Feb. 5 1998)

- Oregon Public Utility Commission, Petition of MFS Communications Company, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996, Decision, Or. PUC Order No. 96-324 (Dec. 9, 1996)

- Pennsylvania Public Utility Commission, Petition for Declaratory Order of TCG Delaware Valley, Inc. for Clarification of Section 5.7.2 of its Interconnection Agreement with Bell Atlantic-Pennsylvania, Inc., P-00971256 (June 2, 1998).

- Tennessee Regulatory Authority, Petition of Brooks Fiber to Enforce Interconnection Agreement and for Emergency Relief, Tenn. RA Docket No. 98-00118 (Apr. 21, 1998)

- Texas Public Utility Commission, Complaint and Request for Expedited ruling of Time Warner Communications, Order, Tex. PUC Docket No. 18082 (Feb. 27, 1998)

- Virginia State Corporation Commission, Petition of Cox Virginia Telecom, Inc. for Enforcement of Interconnection Agreement with Bell-Atlantic-Virginia, Inc. and Arbitration Award for Reciprocal Compensation for the Termination of Local Calls to Internet Service Providers, Final Order, Va. SCC Case No. PUC970069 (Oct. 24 1997)

- Washington Utilities and Transportation Commission, Petition for Arbitration of an Interconnection Agreement Between MFS Communications Company, Inc. and U S West Communications, Inc. Pursuant to 47 U.S.C. § 252, Arbitrator's Report and Decision, Wash. UTC Docket No. UT-960323 (Nov. 8, 1996), aff'd U S West Communications, Inc. v. MFS Intelenet, Inc., No. C97-22WD (W.D. Wash. Jan. 7, 1998

- West Virginia Public Service Commission, MCI Telecommunications Corporation Petition for Arbitration of Unresolved Issues for the Interconnection Negotiations Between MCI and Bell Atlantic - West Virginia, Inc., Order, WV PSC Case No. 97-1210-T-PC (Jan. 13, 1998)

- Wisconsin Public Service Commission, Contractual Disputes About the Terms of an Interconnection Agreement Between Ameritech Wisconsin and TCG Milwaukee, Inc., 5837-TC-100 (May 13, 1998).[15]

The pendency of this issue in numerous state forums -- and the total absence of any support for the ILECs' jurisdictional theory -- is thus an additional and important indication that local calls to ISPs are jurisdictionally intrastate.

III. A FINDING THAT THESE SERVICES CONSTITUTE INTERSTATE ACCESS CHARGES WOULD EFFECTIVELY IMPOSE ACCESS CHARGES ON ISPS CONTRARY TO THE COMMISSION'S EXISTING RULES.

As noted above, it is manifestly clear under long-standing and recently reaffirmed Commission precedent that ISPs are not "telecommunications carriers," and thus are not subject to access charges. Access Charge Reform Order CC Docket No. 96-262 (released May 16, 1996)(at ¶ 341, citing MTS and WATS Market Structure, Memorandum Opinion and Order, Docket No. 78-82, 97 FCC

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[15] Two states have pending for final action hearing examiner recommendations finding that the calls are local -- Delaware and Georgia -- and the issue is involved in proceedings before at least six additional states in Alabama, Alaska, California, Indiana, Kentucky, and Tennessee.

2d 682, 711-22, and Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, Order, 3 FCC Rcd 2631 (1988)).

If the ILECs' DSL tariffs were actually an access service (and they clearly are not for the reasons set forth supra in Part I), then they would violate this rule by applying access charges to local traffic delivered to an ISP. While ISPs clearly have the same right as any end user to order services out of the incumbents' Part 69 tariffs, the above precedents make it clear that ISPs cannot be forced to receive traffic pursuant to access tariffs. Here the ILECs would economically coerce ISPs into paying its access charges by making it the only way they can obtain this functionality. Accordingly, the ILECs' DSL tariffs violate Commission policy by treating ISPs as telecommunications carriers.

The fact the ILECs are forcing ISPs to pay access charges through economic coercion is irrelevant as a matter of law and policy. It is irrelevant as a matter of law because nowhere in the Commission's extensive discussion of this issue has the Commission ever added the caveat: "except where loop enhancements are involved." Indeed, Commission policy is unambiguous and comprehensive: "Under our framework, Internet service providers are not treated as carriers for purposes of interstate access charges .."(Report to Congress at ¶ 106). Accordingly, the ILECs' current attempt to force ISPs onto access charges is legally unavailing.

The ILECs' use of their control over loop provisioning also fails to make any difference as a policy matter. Putting aside whether the particular rates and structure proposed in the current DSL proposals might be attractive to some ISPs, creation of such a loop-hole in current Commission requirements would clearly be bad policy. Currently almost all Internet access traffic is carried over loop facilities that, with relatively few exceptions, at best can only support 56 kps modems or ISDN. Incumbents can use their monopoly control over the timing and nature of any advancements in loop speeds to roll out "Internet access" services at prices that would be attractive to enough spectrum-hungry end users to be profitable, even though many Internet users could not and would not choose to buy the service at those price levels.

Although pricing "Internet access services" in this manner makes perfect sense to a rational profit-maximizing monopolist, it would harm the development of the Internet in two important ways. First, the profit-maximizing levels set by the monopolist would not be purchased by all individuals. Many end users would be effectively cut-off from higher connection speeds, thereby reducing the overall value of the Internet to Americans at large. Second, by using their monopoly power to interpose themselves between the ISPs and their end user customers seeking higher speeds, the incumbents could easily unhook significant portions of the ISPs' current customer base, and divert them to an

incumbent affiliate or favored carrier.[16] Indeed, just the threat of such a diversion could force some ISPs to reach some accommodation with the incumbents.

Currently these policy concerns are minimized because the incumbents' new local data services are subject to state review (see Part II supra, concerning the jurisdictional issues raised by the DSL proposals). State commissions take care to balance issues of cost recovery against the need to insure the widest possible availability of advanced Internet access services, thereby preventing harmful pricing decisions by the incumbents. Any preemption of this state review by the Commission would force the Commission to take on all these tasks. Accordingly, it would plainly be bad policy for the Commission to mandate that DSL calls to ISPs can only be tariffed at the federal level.

IV. THE ILECS FAILED TO SHOW THEY ARE NOT ENGAGED IN A "PRICE SQUEEZE," OR HAVE UNBUNDLED THIS SERVICE AS REQUIRED.

As noted above in discussing the need for state involvement, there is no serious question that incumbents have an inherent ability to subject potential competitors to a "price squeeze" for services like Bell Atlantic's ADSL service. See, e.g., Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion, Order, and NPRM released August 7, 1998, at ¶ 102 ("Wireline Advanced

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[16] This danger is underscored by the fact that nowhere in their direct cases do the ILECs explain how the unbundled portions of their ADSL service offerings would be made available to non-affiliated ISPs pursuant to the Commission's Computer III requirements.

Services Order"; raising the issue of a separate subsidiary's ability to exert a "price squeeze" upon non-affiliated ISPs). See also Minnesota Attorney General Hubert H. Humphrey III's September 14, 1998, lawsuit against US WEST, charging US WEST with "anti-competitive and discriminatory marketing and deployment" of its own DSL service: "US WEST cannot be allowed to use its market advantages as a regulated monopoly to squeeze out its competition by discriminating in favor of its own affiliate."

In this regard, ALTS supports NorthPoint's observations, made in connection with GTE's ADSL filing, that the incumbent had failed to show that its rate was consistent with the prices charged by GTE for components of this service needed by potential competitors (NorthPoint Petition to Reject filed May 22, 1998, at 2:

> "The only basis for assessing the costs of GTE's retail DSL service is to carefully examine the cost components applicable to the provision of DSL service. These components include, among other things, the cost of an unbundled loop and cross-connect, the costs of the equipment and transport required to provide DSL, the cost of necessary collocation, and allocated overhead costs."
>
> "In addition to recovering the costs of an unbundled digital loop, however, GTE's retail ADSL rates must be high enough to recover several other significant cost components faced by any DSL service provider. For example, as set forth in the GTE ADSL tariff, GTE's planned ADSL services requires that ADSL equipment be placed on the central office end of an existing local loop, that modifications be made to the inside wiring, and that the traffic be delivered to an aggregation point designated by GTE."

But the ability of protesting parties to bring the Commission's attention to predatory behavior is severely limited in the present ODIs by the incumbents' refusals to provide the

cost data needed to reveal such activity (see, e.g., Bell Atlantic's letter dated September 1 1998, providing only redacted cost support for Transmittal No. 1076). Imposition of a confidentiality requirement within the already narrow time limits required for a protest makes meaningful cost review impossible. Rather than permit an unsupported filing to take effect, the Commission should suspend it for the maximum period possible.

Additional anti-competitive threats are also raised by the absence of any demonstration from the ILECs that: (1) the components of their DSL service constituting network elements are actually being made available to competitors (see GTE DSL ODI Order at ¶ 19); (2) the DSL service will be made available for resale pursuant to section 251(c)(4) as required by the Wireline Advanced Services Order (id. at ¶ 19: "We note that, by using its network to provide DSL service, GTE is subject to the section 251 obligations .... DSL services offered by ILECs are subject to the resale requirements of section 251(c)(4)"); and, (3) components of the incumbents' service are made available to ISPs pursuant to Computer III (see n. 16, supra). In the absence of such demonstrations, the tariff should be found unlawful.

V. IF THE COMMISSION EXERCISES JURISDICTION OVER DSL CALLS TO ISPS, IT SHOULD USE ITS BASIC AUTHORITY OVER INFORMATION SERVICES, AND NOT ADOPT THE ILECS' "SINGLE CALL" THEORY.

As described in Part II supra, ALTS continues to maintain that DSL calls to ISPs are intrastate traffic for all the reasons set forth there. However, in the event the Commission differs with that reasoning, and concludes instead that it

should assert its own jurisdiction, the Commission should take care in selecting the particular theory under which it makes that claim.

The Commission basically has two options if it insists on claiming jurisdiction. First, it could look to its fundamental responsibility to encourage and foster the growth of information services as a basis for regulating DSL calls to ISPs at the Federal level. By focusing on the policy issue of innovation, the Commission would also have a reasoned basis for leaving in place current state regulation of ISDN and dial-up calls to ISPs, as well as state regulation of carrier-to-carrier compensation for this traffic.[17]

Alternatively, the Commission could attempt to extend its "single call" doctrine (under which the ultimate end points of two separate telecommunications are ultilized to determine the jurisdictional nautre of the two calls), to include for the first time the geographic end points of an information service

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[17] Any ability the Commission might have to encourage DSL deployment by asserting jurisdiction is absent in the case of dial-up calls to ISPS. An assertion of active jurisdiction by the Commission over DSL traffic to ISPs at an early point in its deployment suggests the Commission might be able to alter the effect of regulation on DSL's underlying investment incentives. The circuit-switched network which carries dial-up calls to ISPs presents a very different situation because: (1) this investment is largely already in place; and (2) calls to ISPS represent only a portion of overall circuit-switched traffic. Consequently, assertion of active jurisdiction by the Commission over circuit-switched calls to ISPS would not enable it to alter the investment incentives for the circuit switched network.

in determining the jurisdictional nature of a associated telecommunications message.[18] This approach has several fatal shortcomings.

First, because the new version of the "single call" doctrine urged by the ILECs is entirely mechanical (driven by the ultimate end points of a telecommunications call and an associated information service), rather than being policy-driven, it would be difficult for the Commission to find a principled way to limit its application just to dedicated DSL calls to ISPs. Once the incumbents were handed such a weapon, they would immediatly use it to attempt to move ISDN and dial-up calls to ISPs into the Federal jurisdiction, a result that could effectively destroy state supervision of end user rates under the ISP exemption.

Second, it is not at all clear the Commission could defend the ILECs' new version of the "single call" doctrine on appeal, given the non-carrier status of ISPs recently affirmed by the Commission in the its report to Congress, and also in the Commission's brief to the Eighth Circuit in defense of its Access Charge Reform Order (FCC Brief in Southwestern Bell Telephone Co. v. FCC, 8th Cir. No. 2618, filed December 16,

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[18] The incumbents consume several pages of their filings describing the occasions upon which the Commission has viewed separate telecommunications as a "single call" in determining jurisdiction. See, e.g., GTE at 8-15. ALTS has no quarrel with the doctrine that the Commission can look to multiple telecommunications calls in assessing jurisdiction. What ALTS objects to is the novel and unfounded extension of this doctrine by the ILECs to include information services.

1997, at 80). While it is true the Commission has required some end users to pay access in highly specific circumstances where they function much like a carrier (such as the "leaky PBX" surcharge example discussed by GTE (Direct Case at 22)), those situations involve a second telecommunications message, not an information service. Take the simple example of an end user who calls a local store in order to make a purchase. If the store clerk then fills that order by wiring the customer's request to an out-of-state warehouse, that event has no jurisdictional effect on the end user's call, even if it occured while the end user were on the line. The same is true of ISPs when they perform information services. Because information services are not telecommunications services, the ISPs are not functioning like carriers.[19]

Third, the ILECs apply the Commission's 10% "contamination" rule in addition to their expanded "single call" theory, and conclude that DSL calls to ISPs meets the 10% test.[20] But even if this test were applicable (and it is not, because the only telecommunications service involved is strictly point-to-point intrastate), the ILECs have totally misapplied it in two

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[19] Because none of the Direct Cases allege that the dial-up calls to ISPs in the reciprocal compensation dispute involve any ISP provisioning of Internet telephony, ALTS takes no position here concerning what the Commission's authority would be if those different facts were pleaded.

[20] In the Matter of MTS and WATS Market Structure Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 78-72, CC Docket No. 80-286, 4 FCC Rcd 5660 (1989).

fundamental ways. The 10% rule emerged in the context of special access lines, where the Joint Board recommended to the Commission that a portion of special access traffic should be shifted from the interstate jurisdiction to the state jurisdiction by replacing the existing separations rule (under which any amount of interstate traffic turned a special access facility into an interstate facility), with a rule that special access lines would remain intrastate unless the portion of interstate traffic involved exceeded 10% (id. at ¶ 2).

Furthermore, the Joint Board recommended, and the Commission agreed, that the rule would only apply when customers certified that their special access lines carried more than the provided amount of interstate traffic: "LECs should only require verification when the customer representations involved appear questionable, and that such verification should be limited to general information on system design and functions whenever possible" (id. at ¶ 3, n. 5). Both the Joint Board and the Commission were clear that customer certification was a critical element in achieving the "administrative benefits" that were the goal of the 10% rule (id.).

Neither situation applies to the present DSL tariffs. The Joint Board has not recommended that these calls be treated as interstate (indeed, NARUC has adopted a resolution asking the FCC to work cooperatively with it before resolving the jurisdictional nature of these calls). Furthermore, none of the ILECs's DSL tariffs permit customers to certify whether 10% or